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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

April 10, 2008

In the Matter of:

Town of Marion

Docket No. WET-2007-08
File No. SE 41-1068

RECOMMENDED FINAL DECISION

This case involves the appeal of a Superseding Order of Conditions ("SOC") conditionally approving the construction of a public baseball field by the Town of Marion, a portion of which is in the buffer zone to a Bordering Vegetated Wetland ("BVW"). The petitioners are abutters to the site. On December 21, 2007, the Department filed a Motion to Dismiss for Lack of Standing to which the petitioners filed an Objection.

Abutters may appeal, but must show that they are aggrieved. 310 CMR 10.05(7)j.2.a.; 310 CMR 10.05(7)j.2.b.iii. A "person aggrieved" is defined in the wetlands regulations as "any person who, because of an act or failure to act by the issuing authority, may suffer an injury in fact which is different either in kind or magnitude from that suffered by the general public and

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which is within the scope of the interests identified in M.G.L. c. 131, s. 40.” 310 CMR 10.04. A person claiming status as an aggrieved person must present facts in writing sufficient to allow a determination. 310 CMR 10.05(7)j.2.b.iii.

For purposes of ruling on a motion to dismiss, the petitioner’s factual allegations in the notice of claim are taken as true. Matter of Town of Hull, Docket No. 88-022, Decision on Motion for Reconsideration of Dismissal (July 19, 1988). The sufficiency of the factual showing is satisfied where the allegations of a person claiming to be aggrieved demonstrate at least the possibility that the alleged injury would result if the activity were allowed. Matter of Lepore, Docket No. 2003-092 and 2003-093, Recommended Final Decision (September 2, 2004), Matter of Whouley, Docket No. 99-087, Final Decision (May 16, 2000). An allegation of abstract, conjectural, or hypothetical injury is not sufficient, but a person claiming aggrievement is not required to prove the injury would actually occur to meet this threshold at the preliminary stage of a proceeding. Matter of Charles Doe, Docket No. 97-097, Final Decision (April 15, 1998).

The petitioners’ Notice of Claim recites concerns they have with the alleged impact of the project on wetland resource areas, but is devoid of any statements as to how the project would adversely affect them. The petitioners’ objection does articulate the petitioners’ concerns. As to petitioner Cargill, she alleges that “she will lose the ability to have a tranquil place to enjoy some quite (*sic*) time and introspection.” Petitioner Coggeshall also alleges that her ability to hike and paint will also be impacted. These impacts are not interests protected by the Wetlands Act for which relief can be granted, and they also lack a specificity of injury distinct from other users of the land that establishes standing. Matter of Connolly Brothers, Inc. 9 DEPR 158 (2002).

Petitioner Coggeshall also alleges that surface water runoff onto her property could affect her on-site well, disrupting flora and fauna, and her vegetable garden. She notes most of her land is grassland and woodland, and there is no claim that stormwater will flow into wetland resource areas. These allegations regarding stormwater impacts, however, are not supported by any factual assertions that address the quantity or quality of the stormwater flow or connect the direction of the flow to alleged impacts to her property. The project is the construction of a baseball field, and while trees will be felled, there is no impervious surface being created that would serve to increase or change the direction of the flow. There is no allegation or supporting facts that the post-construction grade of the field will cause or increase stormwater flow in the direction of her property, or that her well is located anywhere near the direction of the flow. The objection does not assert that the detailed conditions (#18-25) in the Order and incorporated by reference in the SOC regarding erosion control measures and management of stormwater sediment during the construction period are inadequate, or that the drainage swale required by the SOC to be installed will not adequately control post-construction run-off.

While the threshold to establish aggrieved party status is low, “it cannot be crossed with anything other than factual support.” Matter of Town of Chatham, 99-078, at page 15, Final Decision (December 22, 1999). Here the unsupported allegations that the ballfield may generate additional stormwater flow that will affect an interest protected by the Wetlands Act are remote and speculative. Matter of Town of Falmouth Department of Public Works, Docket No. 93-032, Decision of Order and Motion to Dismiss (September 2, 1994).

For the reasons set forth above, I recommend that the Department’s motion to dismiss be granted and the appeal dismissed.

NOTICE

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for her Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.

Philip Weinberg
Presiding Officer

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